No. 12211

In the United States Circuit Court of Appeals For the Ninth Circuit

EVERT L. HAGAN,
Appellant,
vs.
CENTRAL AVENUE DAIRY INC.,
Respondent.

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court for the Southern District of California, Central Division

EVERT L. HAGAN, IN PRO
115 N. Eastern Avenue,
Los Angeles 22, Calif.,
Attorney for Appellant.

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STATEMENT OF FACTS

The original action in this case was statutory interpleader brought under the Act approved January 5, 1948, Chapter 646, Public Law 773, Laws of the 80th Congress, 2nd Session, U. S. Code, Title 28, Section 1335.

In the original complaint filed by the Title Insurance & Trust Company it was alleged that the Title Insurance & Trust Company was escrow holder of the sum of $1750 deposited by Evert L. Hagan in an escrow agreement between Evert L. Hagan and the

Central Avenue Dairy Inc.; that the Central Avenue Dairy was a resident of the State of Arizona, and Evert L. Hagan was a resident of California; that said amount was in excess of $500, and that Evert L. Hagan and Central Avenue Dairy Inc., had presented conflicting claims to the Title Insurance & Trust Company for the said fund; that the Title Insurance & Trust Company in order to escape the possibility of dual liability prayed that interpleader be adjudged, that it be allowed to deposit the $1750 into the registry of the Court and be discharged from liability on account of said escrow agreement; and that Evert L. Hagan and the Central Avenue Dairy be enjoined from prosecuting any claim relating to said escrow agreement in any other court, state or federal.

The Central Avenue Dairy Inc., and Evert L. Hagan were served by the United States Marshal in Arizona and California respectively, with process and an order to show cause why the injunction prayed for by the Title Insurance & Trust Company should not be made permanent. The Central Avenue Dairy Inc., failed to appear to show cause why the injunction should not be permanent. Evert L. Hagan appeared and assented to the adjudication of interpleader. He also filed an answer claiming the $1750 fund deposited alleging that the fund had been deposited by Evert L. Hagan in order to secure the performance of a certain contract entered into between Evert L. Hagan and the Central Avenue Dairy under the date of November 8, 1938. Evert L. Hagan further alleged

that the contract provided for the sale and delivery by the Central Avenue Dairy to Evert L. Hagan of cheese products at specified prices; that the Central Avenue Dairy had breached the said contract by refusing to deliver to Evert L. Hagan in accordance with its terms. The Central Avenue Dairy Inc., was alleged to have prevented the performance by Evert L. Hagan of his side of the contract and had thereby waived all rights of payment in the manner provided for in the contract, and that therefore Evert L. Hagan was entitled to the said $1750.00. Along with this answer, Evert L. Hagan filed a cross claim or cross complaint, alleging that by virtue of the same breaches of the same contract, which he alleged gave him the right to claim the fund deposited, that he had been damaged in the amount of $200,000.00 and prayed the Court to render him damages in this amount, plus his costs. After the District Court had entered the default order making the injunction heretofore referred to permanent, the Central Avenue Dairy appeared specially and moved to quash and set aside the service of the answer, claim and cross complaint of Evert L. Hagan, for the reason that such service was made outside the Federal District and State wherein the Court was sitting, and because no summons was delivered with the said Answer, Claim and Cross Complaint. The record will show that said answer, claim and cross complaint was served twice, once by registered mail to the statutory agent of the Central

Avenue Dairy, and secondly by service through a United States Marshal upon the President of the Central Avenue Dairy Inc.

The district Court dismissed the cross complaint for the reason that it found there was a lack of jurisdiction of the defendant, Central Avenue Dairy Inc., to entertain the cross complaint. Appellant Evert L. Hagan appeals from said order of dismissal of said cross complaint.

APPELLANT'S CONTENTION AND STATEMENT OF POINTS ON APPEAL

By way of preface it should be stated that a default judgment was granted claimant Evert L. Hagan upon his claim filed herein to the funds deposited in interpleader. This appeal does not involve this default judgment, but only the order of the District Court refusing to entertain the cross claim or cross complaint. The Points on Appeal are:

1. In an interpleader action filed under the act approved January 25, 1948, Chapter 646, Public Law #773, Laws of the 80th Congress, Second Session, United States Codes, Title 28, Section 1335, wherein the Court has obtained jurisdiction of both claimants, and interpleader is adjudged to be proper, may the Court entertain a cross claim or cross complaint made by the claimant resident in the State where the Court

is sitting, against the non-resident claimant, where the cross claim or cross complaint was served and filed by the resident claimant upon the non-resident claimant, when the cross claim or cross complaint involved a claim for damages in addition to the claim for the fund deposited in interpleader, when the claim for the fund deposited and the claim for damages arise from and are based upon the same breach of the same contract.

2. Appellant contends that the District Court, having once obtained jurisdiction of the non-resident Central Avenue Dairy Inc., for the purposes of interpleader, had jurisdiction to adjudicate cross claims between claimants which were germane to the issues involved in the interpleader.
3. The District Court erred in ruling it could not entertain a cross claim by the resident claimant against the non-resident claimant where the cross claim arose out of the same breach of the same contract that the deposit in the interpleader and the conflicting claims thereto arose.
4. The District Court erred in dismissing a cross claim where the two claimants are before the Court in interpleader and the deposit is claimed by one claimant by virtue of a breach of a contract, and the same claimant also claims damages by way of cross claim for the same breach of the same contract.

POINTS AND AUTHORITIES

I.

THERE WAS JURISDICTION OF THE DISTRICT COURT IN LOS ANGELES TO ENTERTAIN THE INTERPLEADER ACTION AND ISSUE PROCESS ANYWHERE IN THE UNITED STATES.

Chapter 646, Public Law 773, Laws of the 80th Congress, 2nd Session, U. S. Code, Title 28, Sec. 1335.

II.

THE COURT, HAVING OBTAINED JURISDICTION TO DECIDE THE INTERPLEADER, SHOULD DETERMINE ALL CONTROVERSIES BETWEEN THE CLAIMANTS, WHICH ARE GERMANE TO THE ISSUES, AND WHICH CAN BE DECIDED WITHOUT PREJUDICE TO THE RIGHTS OF OTHERS.

Providence Sav. & Loan v. Booth (Neb.), 138 Neb. 424, 293 N. W. 293;

Seattle v. Turner, Wash., 29, 51569 P. 1083;

Irwin v. Ratliff, 94 Ind. 583.

III.

NO SUMMONS WAS NECESSARY IN SERVING THE CROSS COMPLAINT

Rules of Federal Procedure 5(a); 4(d)3, and Rule 4F.

"5(a) Every order required by its terms to be served, EVERY PLEADING SUBSEQUENT TO THE ORIGINAL COMPLAINT unless the Court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties affected thereby, but no service need be made on parties in default for failure to appear EXCEPT THAT PLEADINGS ASSERTING NEW OR ADDITIONAL CLAIMS for relief against them shall be SERVED upon them in the MANNER PROVIDED FOR SERVICE OF SUMMONS IN RULE 4."

"4(d)(3). Upon a domestic or FOREIGN CORPORATION or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process, and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant." (Capitals ours.)

"4(f) All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45."

Process embraces all steps and proceedings in a cause from its commencement to its conclusion.

U. S. v. Murphy, 82 F. 893.

"Neither is process" (used here to cover necessity for summons) "upon a counterclaim necessary to bring in the plaintiff or a co-defendant. Several cases may be noted which have dicta that the same process is necessary on a counter claim as on an original complaint, but on the facts involved they do not lay down rules for federal practice."

CYCLOPEDIA OF FEDERAL PROCEDURE (2d Ed.) Vol. 4, P. 85, where authorities are cited.

HUGHES FEDERAL PRACTICE JURISDICTION AND PROCEDURE, Vol. 17, (1940 Ed.) P. 226, in discussing the interpretation of Rule 5(a) and Rule 4, says:

"After all, if service of the original complaint and summons has been properly made under the provisions of Rule 4, the Court already has jurisdiction over him, regardless of the fact of his appearance or non-appearance, and the Court should be allowed to exercise that jurisdiction in connection with anything relating to the case and arising be-

cause of it. This seems to be the logical meaning of the rule and the one best qualified to do justice between the parties with the minimum expenditure of time and money."

IV.

THE COURT, HAVING ONCE OBTAINED JURISDICTION OF THE PARTIES, SHOULD DO COMPLETE JUSTICE BETWEEN THEM.

In the case of *Mathis v. Ligon,* 39 Fed. (2) 455, C. C. A. 10th Circuit, 1930, it is said (L. C. 456):

"The second proposition is predicated upon the contention that the Court was without jurisdiction of the counter claim filed by Mathis against his co-defendants and against Maceo Rains. The counter claim developed from what was formerly known in equity practice as a cross bill. It involved the validity of a resale tax deed and the title, if any, which passed to Mathis by virtue thereof, and by which Mathis sought to establish affirmatively the validity of such resale tax deed and his title thereunder, as against Maceo Rains and his co-defendants. In his original bill of complaint Maceo Rains contended as an issue the question of the validity of such tax deed and the title of Mathis thereunder. A cross bill is a pleading by the defendant in a suit against the plaintiff in the same suit or against other defendants in the same suit, or against both, touching the matters in question in the original bill. It must be either in aid of a defense to the original bill or

to obtain full relief to all parties touching the matters in the original bill. *Oregon Co. v. Peck Bentley Ry.,* 137 U. S. 171, 11 Sup. Ct. 61; 34 L. Ed. 625; *Landon v. Pub. Ut. Co.,* (D. C.) 234 Fed. 152; *21 C. J.* 498, Section 597. Such a cross bill is ancillary to the original bill and if the court has jurisdiction of the case made by the original bill, it has jurisdiction of a defendant cross bill. *Wrigley Land Co. v. Miller & Look,* 218 U. S. 258; 31 Sup. Ct. 11; 54 L. Ed. 1032; *R. R. Co. v. Canlin,* 6 Wall 748; 18 L. Ed. 859; *Osborne & Co. v. Barg* (D. C.) 30 Fed. 805; *1st Natl. Bank of Salem v. Salem Capitol Flour Mills* (D. C.) 31 Fed. 580; *Freeman v. Howe,* 24 Howard 450, 16 L. Ed. 749; *Brooks v. Laurent* (D. C.) 98 Fed. 647. Since the court had jurisdiction of the case made by the original bill in the instant case it had jurisdiction of the cross bill which was a germane ancillary proceeding."

In *Barnett v. Mays,* 43 Fed. (2) 521, it was held that a court having acquired jurisdiction to settle part of a controversy presented for determination, has power and authority to determine the entire controversy.

In *Jones v. St. Paul Fire & Marine Ins. Co.,* 108 Fed. (2) 123, it is held that the new rules of civil procedure for district courts insist and require that all claims growing out of a single transaction be brought and settled in one civil action, the fact that one claim alone involves less than $3000 is no obstacle if controversy as a whole involved that much and jurisdic-

tion once acquired lasts until the court finishes with all parts of the controversy. Citing *Rules of Federal Procedure for District Court,* Rules 13D and 15B and 18A; 28 U. S. Code annotated, following section 723B.

The case of *Sun Oil Co. v. Hereford,* 130 Fed. (2) 10, held that when a Federal Court has jurisdiction of a controversy on the ground of diversity of citizenship it has the power to decide all issues arising therein under the laws of any state in accordance with the statutes of that state, and the same rule applies where Federal jurisdiction attaches solely by reason of a federal question.

In the case of *El Paso and S. W. R. Co. v. Arizona Corp. Com.,* 51 Fed. (2) 573 (District Court 1931) it was held that equity jurisprudence recognizes the propriety of cross bills following the rule that a court of equity has jurisdiction of all cross or counter claims growing out of and germane and ancillary to plaintiffs cause of action, even though they could not be pleaded as independent suits within the federal jurisdiction.

See also

U. S. v. Pryor, 2 F. R. S. 179;

Sherman Natl. Bank v. Schubert Theat. Co., 238 Fed. 225; 247 Fed. 256.

Appellant calls particular attention to *U. S. ex rel. Foster Wheeler Corp. v. American Surety Co.,* 25 Fed. Supp. 700, which said:

> "While it is true that because of lack of diversity of citizenship, the intervening defendant could

not sue the plaintiff in this court on the facts alleged in its counterclaim, if those facts were set forth in an independent suit, yet this fact does not deprive this court of jurisdiction. THE MAIN ACTION IS BROUGHT UNDER A STATUTE OF THE UNITED STATES. (Capitals ours.) To this complaint must be set up all counter claims arising out of the same transaction. Rule 13A of the Rules of Civil Procedure, 28 U. S. C. A. following Section 723C. Under such circumstances no independent jurisdiction is necessary for the assertion of the counter claim. *Moore v. New York Cotton Exchange,* 270 U. S. 593; 46 S. Ct. 367, 70 L. Ed. 750, 45 A. L. R. 1370; *Moore, Federal Practice,* page 686."

V.

INTERPLEADER IS OF AN EQUITABLE NATURE AND EQUITY FROWNS UPON MULTIPLICITY OF ACTIONS.

Kalo Inoculast v. Seeds Co., 161 F. 981;
Trico Products v. Anderson, 147 F. 721.

VI.

RULE 13g OF THE FEDERAL RULES OF PROCEDURE SHOWS THE PROPRIETY OF SETTLEMENT OF ALL GERMANE ISSUES IN A SINGLE ACTION IN ORDER TO AVOID A DETERMINATION OF ONE PART OF A CONTROVERSY, AND THEN RELEGATE THE LITIGANT TO ANOTHER FORUM FOR COMPLETE RELIEF.

Rule 13g provides:

> "A pleading may state as a cross claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim, therein, or relating to any property that is the subject matter of the original action. Such cross claim may include a claim that the party against whom it is asserted is, or may be liable to the cross claimant for all or part of a claim asserted in the action against the claimant."

As was said in *Carter Oil Co. v. Wood,* 30 Fed. Supp. 887:

> " . . . to justify adjudication of a counterclaim it was only essential that it be of a character making it necessary to realization of complete justice as to the subject matter of the original cause of action. Thus it has been repeatedly held that where the court has jurisdiction of a complaint seeking to protect property rights and a defend-

ant claims a superior right therein not only as against the plaintiff but as against co-defendants, a cross bill to that effect will be sustained even though as between the parties thereto, diversity of citizenship does not exist. *Craig v. Dorr,* (4 Cir.); 145 F. 307; *Federal Mining & Smelting Co. v. Bunker Hill & Sullivan Mining & Conc. Co.,* (C. C.) 187 F. 474; *Ames Realty Co. v. Big Indian Mining Co.,* (C. C.) 146 F. 166; *Miller v. Lux,* 218 U. S. 258; 31 S. Ct. 11; 54 L. Ed. 1032. *This results from the reasoning that the jurisdiction of the court attaches upon the filing of the original bill of complaint and federal jurisdiction appearing therein, incidental to that jurisdiction in order to do complete justice between all of the parties, the court may and should entertain all cross bills or counter claims relating to the subject matter relied upon by plaintiff and decide all questions necessary to a complete adjudication of all issues involved in the subject matter of the original bill. Campbell et al. v. Golden Cycle Min. Co.,* 8 Cir.; 141 F. 610; *Moore v. New York Cotton Exchange,* D. C. 291 F. 681, affirmed 2 Cir. 296 F. 61; Id. 270 U. S. 593; 46 S. Ct. 367; 70 L. Ed. 750; 45 A. L. R. 1370. *The decision last cited is applicable not only to the propriety of cross bills but also to that of counter claims growing out of the same subject matter covered by rule 13.*" (Italics ours.)

See *Moore v. U. S. Cotton Exch.,* 270 U. S. 573; 46 Sup. Ct. 367, wherein it is held that such a construction should be placed upon the federal rules.

VII.

THE CLAIMANT HAS BEEN ADJUDICATED AS ENTITLED TO THE FUND DEPOSITED IN COURT BY REASON OF THE BREACH OF THE CONTRACT BY THE CENTRAL AVENUE DAIRY INC. EVERT L. HAGAN SHOULD NOT NOW HAVE TO SEEK ANOTHER TRIBUNAL TO COLLECT HIS DAMAGES SUFFERED BY REASON OF THE SAME BREACH OF THE SAME CONTRACT.

56 Harvard Law Review 969;

Freeman v. Bee Mch. Co., 319 U. S. 448, 63 Sup. Ct. Rep. 1146;

Moore Federal Practice, page 586.

CONCLUSION AND ARGUMENT

The sole question here is the adequacy of a Federal District Court to handle to completion litigation presented to it. Can the Federal Courts, having obtained complete jurisdiction of the parties to an action, do complete justice between them or can it do a piecemeal portion thereof and send the litigants off to another tribunal to obtain justice? Appellant believes that this Court, knowing of already crowded dockets in every court in the land, should and will welcome an opportunity to finally dispose of all germane issues to any controversy that is presented to it, so long as the original jurisdiction is proper and correct.

Attention of the court is called to the holdings in the *Bee Machinery* case, 63 Supp. Ct. Rep. 1146, and in *U. S. ex rel. Foster Wheeler v. Am. Surety Co.,* 25 Fed. Supp. 700. The effect of these cases is to establish the rule that ONCE A FEDERAL COURT OBTAINS JURISDICTION OF PARTIES SAID JURISDICTION IS GENERAL AND NOT SPECIAL, and any matters germane to the issues of the original jurisdiction may be decided by the Court. This is true even though these other germane matters might not have been matters which taken alone and within themselves would be matters for the basis of original federal jurisdiction. See *Moore v. New York Cotton Exchange,* 270 U. S. 573; 46 Sup. Ct. 367.

The question before the Court is in reality the ability of the Federal Courts to make themselves adequate to the demands of modern litigation. Who would be prejudiced by a ruling that the cross complaint could be properly entertained? The Central Avenue Dairy, already in court upon the interpleader could make any legal defense it might have. Evert L. Hagan will have the right given him to have all issues arising out of the controversy determined in one suit. Is complete justice apt to be accomplished by two courts hearing the matter piecemeal? Or by one court taking cognizance of the entire relation between the parties, and finally once and for all adjudging the rights of the parties.

Justice will be more nearly performed by a complete determination rather than a determination in

parcels. The District Court should have entertained the cross complaint, and appellant respectfully submits that in not so doing, it has fallen into error.

Respectfully submitted,

EVERT L. HAGAN,
Attorney for Appellant.